Supreme Court, U.S.
FILED

941321 FEB 2 1995

OFFICE OF THE CLERK

No. 95-

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1994

---

HARLEY-DAVIDSON, INC.,

*Petitioner,*

v.

MINSTAR, INC., and AMF INCORPORATED,

*Respondents.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

---

# PETITION FOR WRIT OF CERTIORARI

---

Jeffrey P. Clark
Counsel of Record
REINHART, BOERNER,
VAN DEUREN, NORRIS &
RIESELBACH, s.c.
1000 North Water Street
Suite 2100
P.O. Box 92900
Milwaukee, Wisconsin 53202
(414) 298-1000

Attorneys for Petitioner

65pp

## QUESTIONS PRESENTED FOR REVIEW

A. Does Section 107(e)(1), 42 U.S.C. § 9607(e)(1), of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") prohibit indemnification agreements between CERCLA "potentially responsible parties" ("PRPs"), such as Harley-Davidson, Inc. ("Harley-Davidson") and AMF Incorporated ("AMF")?

B. May a court disregard other relevant equitable considerations, such as the "Gore Factors", and base allocation of CERCLA liability among PRPs solely upon an indemnification agreement?

C. Did the United States Court of Appeals for the Seventh Circuit properly bar Harley-Davidson's claim against AMF and its corporate parent, Minstar, Inc. ("Minstar"), when (i) the indemnification agreements at issue in this action raise disputed material

issues of triable fact which were not the subject of this appeal and have not been considered by the District Court; (ii) the Seventh Circuit apparently relied on only one of the two indemnification agreements between the parties; and (iii) the Seventh Circuit did not apply the proper state-law rule of construction for indemnification agreements -- that the court construe any ambiguity against the drafter?

## PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ..... ii

PARTIES ..... iv

TABLE OF CONTENTS ..... v

TABLE OF AUTHORITIES ..... vii

OPINIONS BY OTHER COURTS ..... 2

JURISDICTION ..... 3

INTRODUCTION ..... 6

STATEMENT OF THE CASE ..... 7

FEDERAL JURISDICTION BELOW ..... 16

SUMMARY OF ARGUMENT ..... 17

I. THIS COURT HAS NOT DECIDED THE IMPORTANT QUESTION OF WHETHER SECTION 107(e)(1) OF CERCLA PERMITS INDEMNIFICATION AGREEMENTS BETWEEN POTENTIALLY RESPONSIBLE PARTIES ..... 20

II. THE SEVENTH CIRCUIT APPARENTLY DID NOT CONSIDER ANY EQUITABLE FACTORS OTHER THAN THE 1980 INDEMNIFICATION AGREEMENT BETWEEN AMF AND AMF YORK ... 33

III. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COMMITTED JUDICIAL ERRORS IN THIS CASE THAT WILL GO UNREMEDIED IF THE SUPREME COURT DOES NOT GRANT CERTIORARI ..... 40

A. The Seventh Circuit Appears to Have Relied On Only One of the Two Essential Indemnification Agreements in This Case ..... 41

B. The Seventh Circuit Did Not Apply The Proper Rules For Construing Indemnification Agreements ..... 47

CONCLUSION ..... 52

# TABLE OF AUTHORITIES

CASES

AM Intern., Inc. v. International Forging Equipment, 743 F. Supp. 525 (N.D. Ohio 1990), rev'd in part, 982 F.2d 989 (6th Cir. 1993) ..... 24, 30

Beazer East v. The Mead Corp., 34 F.3d 206, 211 (3d Cir.) reh'g denied (1994) ..... 18, 24, 25 28, 48

Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49 (2d Cir. 1993) ..... 24, 30

CPC International, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D. Mich. 1991), reconsideration denied sub nom, U.S. v. Cordova Chemical of Michigan, 1991 WL 111515 (W.D. Mich., March 26, 1991) ..... 24

Danella Southwest v. Southwestern Bell Telephone, 775 F. Supp. 1227, 1240 (E.D. Mo. 1991), aff'd, 978 F.2d 1263 (8th Cir. 1992) ..... 24

Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 72 S. Ct. 312, 96 L.Ed. 398 (1952) ..... 48

DiPetro v. City of Philadelphia, 496 A.2d 407, 410 (Pa. Super. 1985) ..... 49

Environmental Trans. Systems v. Ensco, Inc., 969 F.2d 503, 508 (7th Cir. 1992) ..... 36, 38

Fisher Development Co. v. Boise Cascade Corp., 37 F.3d 104, 109 (3d Cir. 1994) ..... 48

Folino v. Hampden Color and Chemical Co., 832 F. Supp. 757, 760 (D. Vt. 1993) ..... 29

Gross v. Sweet, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365, 367 (Ct. App. 1979) ..... 51

Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir.), reh'g denied (1994) ..... passim

Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. 978 (E.D. Wis. 1993), rev'd, 41 F.3d 341 (7th Cir.), reh'g denied (1994) ..... 2, 13, 23

Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 390 (1986) ..... 50

John S. Boyd Co., Inc., v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993) ... 24, 25, 30, 48

Jones-Hamilton v. Beazer Materials & Services, 973 F.2d 688, 692 (9th Cir. 1992) ..... 18

Joslyn Manufacturing Co. v. Koppers Company, Inc., 40 F.3d 750 (5th Cir. 1994) ..... 25

Kerr-McGee Chemical v. Lefton Iron & Metal, 14 F.3d 321 (7th Cir.), reh'g denied (1994) ..... 34, 36

Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) .... passim

Niecko v. EMRO Marketing Co., 973 F.2d 1296 (6th Cir. 1992) ..... 25, 31

Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133, 1139 (S.D.N.Y. 1992), aff'd in part, vacated in part, 5 F.3d 10 (2d Cir. 1993) ..... 27

Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10 (2d Cir. 1993) ..... 27, 30, 48

Peterson v. Sealed Air Corp., 902 F.2d 1232, 1233 (7th Cir.), reh'g denied (1990) ..... 46

Ramos v. Browning-Ferris Industries of South Jersey, 103 N.J. 177, 191, 510 A.2d 1151 (N.J. 1986) ..... 51

Shapiro v. Alexanderson, 741 F. Supp. 472 (S.D.N.Y. 1990), reargument denied, 743 F. Supp. 268 (S.D.N.Y. 1990) ..... 24

Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988) ..... 31

Spivey v. Great Atlantic & Pacific Tea Co., 255 N.W.2d 469 (Wis. 1977) .. 51

Tippins Inc. v. USX Corp., 37 F.3d 87 (3d Cir. 1994) ..... 48, 49

U.S. v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) ..... 36

U.S. v. Hardage, 985 F.2d 1427 (10th Cir. 1993) ..... passim

U.S. v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991) ..... 38

U.S. v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 1013 (D.S.C. 1984), Aff'd in part and vacated in part sub. nom., U.S. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) ..... 29

CONSTITUTIONS AND STATUTES

28 U.S.C. § 1292(b) ..... 14

28 U.S.C. § 1331 ..... 16

28 U.S.C. § 1332 ..... 17

28 U.S.C. § 1367 ..... 17

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) ..... 3, 11, 12

Section 107(e)(1) of CERCLA, 42 U.S.C. § 9607(e)(1) ..... passim

Section 113(b) of CERCLA, 42 U.S.C. § 9613(b) ..... 13, 16

Section 113(f) of CERCLA, 42 U.S.C. § 9613(f)(1) ..... 5, 13

35 Pa. Stat. §§ 701, 702, 705 ..... 11

OTHER SOURCES

EPA Enforcement, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,179 (April 1993) 21

Steven Ferrey, The New Wave: Superfund Allocation Strategies and Outcomes, 25 Environment Reporter 790 (8/26/94) 21

Eve L. Pouliot, Coercion vs. Cooperation: Suggestions for the Better Effectuation of CERCLA (Superfund), 47 SMU L. Rev. 607 (1992) ..... 21

Restatement (Second) Conflict of Laws §§ 222, 224(2) (1971) ..... 49

U.S. EPA, CERCLA-3rd Quarter FY 92 Superfund Management Reporter, (June 30, 1992) ..... 21

Charles A. Wright, et al., Federal Practice and Procedure, § 3921 (1977) ..... 46

No. 95- _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

---

HARLEY-DAVIDSON, INC.,

*Petitioner,*

v.

MINSTAR, INC., and AMF INCORPORATED,

*Respondents.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

# PETITION FOR WRIT OF CERTIORARI

---

Harley-Davidson, Inc. ("Harley-Davidson"), by its attorneys, asks that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered on November 30, 1994.

OPINIONS BY OTHER COURTS

1. Decision of which review is sought: Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir.), reh'g denied (1994) (Appendix A).

2. Grant of Stay of Mandate: Harley-Davidson, Inc. v. Minstar, Inc., Case No. 94-2171 (1/6/95) (Appendix B).

3. Denial of Motion for Rehearing, with Suggestion for Rehearing En Banc: Harley-Davidson, Inc. v. Minstar, Inc., Case No. 94-2171 (12/28/94) (Appendix C).

4. District Court decision: Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. 978 (E.D. Wis. 1993) (Appendix D).

## JURISDICTION

The Court of Appeals for the Seventh Circuit rendered its judgment in this matter on November 30, 1994. Harley-Davidson's motion for rehearing, with suggestion for en banc, was denied on December 28, 1994. Harley-Davidson's motion for stay of mandate was granted on January 6, 1995. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 107(a) of CERCLA:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or

> treatment, of hazardous substances owned or possessed by such person, by any party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person,
>
> from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

42 U.S.C. § 9607(a).

Section 107(e)(1) of CERCLA:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a

> release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1).

Section 113(f)(1) of CERCLA:

> Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a). Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this section shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

42 U.S.C. § 9613(f)(1).

## INTRODUCTION

Companies which buy or sell contaminated properties often negotiate the issue of whether one party to the transaction will indemnify the other from potential environmental liability under CERCLA. The purchase and sale contracts which these companies negotiate typically allocate the risk of CERCLA environmental liability between buyer and seller. Because cleaning up polluted sites can be quite costly -- often running into the millions of dollars -- these environmental liability allocation contracts frequently are challenged in federal courts on the grounds they contravene the CERCLA principle that the polluter pays and violate Section 107(e)(1) of CERCLA.

This case presents this Court with the opportunity to define the appropriate standard for determining whether such an indemnity contract is

enforceable and to provide contracting parties, federal district and appellate courts and litigants with guidance. Such guidance hopefully will help to reduce the substantial transaction costs associated with resolving these environmental liability allocation disputes. Therefore, this Court should grant Harley-Davidson's petition for issuance of a writ of certiorari to the Seventh Circuit to establish the appropriate standard for applying Section 107(e)(1) of CERCLA to environmental liability allocation agreements.

## STATEMENT OF THE CASE

This case involves a CERCLA cost-recovery suit brought by Harley-Davidson, Inc. ("Harley-Davidson") against Minstar, Inc. ("Minstar"), AMF Incorporated ("AMF"), and the United States of America, the United States Department of Defense, and the United

States Department of the Navy (collectively the "Navy") to compel those parties to pay their fair share to clean up the environmental pollution they caused at a manufacturing facility the Navy and, later, AMF owned and operated in Pennsylvania.

This case centers around the environmental pollution at a site in York, Pennsylvania. The Navy took title to the site in 1944, operating it until 1964 as the York Naval Ordnance Plant. The Navy sold the York site to AMF on January 31, 1964. In December 1980, AMF transferred the York Facility to its wholly owned subsidiary, AMF York, Incorporated ("AMF York"). The 1980 Acquisition Agreement between AMF and its spin-off corporation, AMF York, included the following indemnification language:

> AMF York Incorporated shall assume and discharge, and shall indemnify AMF

> Incorporated against all debts, liabilities and obligations, without any limitation, relating to AMF Incorporated's AMF York Division, its operations and products, whether known or unknown . . . and whether existing on the date of this agreement or coming into existence hereafter.

On June 16, 1981, AMF sold the York Facility to Harley-Davidson, via a Purchase Agreement. The 1981 Purchase Agreement between Harley-Davidson and AMF included two relevant indemnification clauses:

> AMF agrees to indemnify and hold [Harley-Davidson] harmless against and in respect of: . . . (ii) any loss, liability or obligation . . . in connection with . . . (I) any liability or obligation of AMF or any of the Companies or the Subsidiaries arising out of or resulting from an event or occurrence happening prior to the Closing Date due to non-compliance with any Federal, state or local law, regulation, order

> or administrative or judicial determination relating to the environment. . . .[1]

Section 10.5(a)(ii)(I) of 1981 Purchase Agreement. Further,

> AMF agrees to indemnify and hold [Harley-Davidson] harmless against and in respect of: . . . (ii) any loss, liability or obligation . . . in connection with . . . (G) any liability or obligation in connection with the golf car business, whether arising out of an even or occurrence happening prior to, on or after the Closing Date, in excess of applicable reserves in the Adjusted Closing Balance Sheet. . . .

Section 10.5(a)(ii)(G) of 1981 Purchase Agreement. Minstar acquired AMF in 1985.

All three owners of the York Facility -- including the Navy, AMF and Harley-Davidson -- performed manufacturing operations at the site. In 1986,

---

[1]AMF York was specifically designated as a "Company" in the 1981 Purchase Agreement, thus, AMF expressly indemnified Harley-Davidson for certain of AMF York's liabilities.

five years after acquiring the York Facility, Harley-Davidson conducted an environmental audit at the site and discovered significant environmental contamination. Since 1986, Harley-Davidson has investigated and cleaned up that contamination under the supervision of the Pennsylvania Department of Environmental Resources.

On July 31, 1991, Harley-Davidson filed a six-count Amended Complaint, in the United States District Court for the Eastern District of Wisconsin, against Minstar, AMF and the Navy. The Amended Complaint asserts claims against all defendants under Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613. The Amended Complaint also asserts claims against Minstar and AMF under Sections 701, 702 and 705 of the Pennsylvania Hazardous Sites Cleanup

Act ("PAHSCA"), 35 Pa. Stat. §§ 701, 702, and 705.

On November 5, 1993, Judge Rudolph T. Randa, of the U.S. District Court for the Eastern District of Wisconsin, decided the first sentence of Section 107(e)(1), of CERCLA, precludes the use of any indemnification, hold harmless or similar agreement to contractually transfer the liability that one PRP owes to the Government or another PRP. The District Court further concluded the second sentence of Section 107(e)(1) permits indemnification, hold harmless and similar agreements between a PRP and a party not otherwise liable under CERCLA.

The District Court reasoned that the second sentence of Section 107(e)(1) must modify the terms of the first sentence of that section. Because CERCLA defines

liability in a different statutory section, Section 107(a), the District Court determined that the second sentence of 107(e)(1) must modify the language "any other person" in the first sentence. As the District Court concluded:

> Read this way, the second sentence permits the transfer of liability owed by a potentially responsible party to a non-liable or non-potentially responsible party, such as an insurance company.

Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. at 984.

The District Court held that the 1980 internal indemnification agreement between AMF and AMF York was ineffective, and did not shield AMF or Minstar from CERCLA liability for their pollution at the York site. In light of this holding, the District Court denied the motion of AMF and Minstar for summary judgment. The District Court did not reach the material issues of triable fact

between the parties concerning the appropriate allocation of responsibility among the parties for cleaning up the York Facility.

On February 4, 1994, the District Court certified its earlier decision for appeal pursuant to 28 U.S.C. § 1292(b), finding that its decision "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the [decision] may materially advance the ultimate termination of the litigation."

The United States Court of Appeals for the Seventh Circuit accepted the interlocutory appeal on April 26, 1994. Harley-Davidson's claims against the Navy, which is not a party to this appeal, remained for disposition in the District Court.

On November 30, 1994, a three-judge panel of the Seventh Circuit reversed the District Court. Rather than treating the second sentence of Section 107(e)(1) as a modifier of the first sentence, the Seventh Circuit treated each sentence separately. Thus, the Seventh Circuit determined:

> The first sentence speaks of "transfer[ring] . . . liability, "that is, of shifting liability from one person to another. Indemnification does not do that. The party remains fully liable to whomever he has wronged; he just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting.

Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d at 343.

The Seventh Circuit concluded by stating, "The indemnification agreement is enforceable and applicable, and bars Harley-Davidson's claim against these defendants." Id., at 344.

On December 28, 1994, the Seventh Circuit denied Harley-Davidson's motion for rehearing, with suggestion for rehearing en banc, without discussion.

Subsequently, Harley-Davidson moved for a stay of mandate, pursuant to Rule 41 of the Federal Rules of Appellate Procedure -- which requires that the petition for certiorari must present a substantial question -- and Circuit Rule 41 of the Rules of the Seventh Circuit -- which provides that a mandate will not ordinarily be stayed unless there is a substantial showing that the petition for certiorari raises an important question meriting review by the Supreme Court. On January 6, 1995, the Seventh Circuit granted Harley-Davidson's motion for stay of mandate to and including February 5, 1995.

## FEDERAL JURISDICTION BELOW

The District Court exercised subject matter jurisdiction on the following bases: (a) federal question jurisdiction pursuant to 28 U.S.C. § 1331; (b) federal district courts have exclusive jurisdiction over all CERCLA claims pursuant to 42 U.S.C. § 9613(b); (c) supplemental jurisdiction over the PAHSCA claims pursuant to 28 U.S.C. § 1367, because they arise out of a common nucleus of operative facts and would ordinarily be tried in a single action; and (d) diversity jurisdiction pursuant to 28 U.S.C. § 1332, because at the time the suit was initiated there was complete diversity of citizenship between Harley-Davidson, a Wisconsin corporation with its principal place of business in Wisconsin, and Minstar, a Delaware corporation with its principal place of business in Minnesota, and AMF, a New

Jersey corporation with its principal place of business in Minnesota, and the amount in controversy exceeds $50,000, exclusive of interest and costs.

SUMMARY OF ARGUMENT

"The tendency of the law must always be to narrow the field of uncertainty." Oliver Wendell Holmes, Common Law 127 (1881).

"CERCLA's provision regarding indemnity clauses is truly murky. . . ." Jones-Hamilton v. Beazer Materials & Services, 973 F.2d 688, 692 (9th Cir. 1992). Section 107(e)(1) of CERCLA, 42 U.S.C. § 9607(e)(1), "taken as a whole is notably obscure. . . ." Harley-Davidson, Inc. v. Minstar Inc., 41 F.3d at 342. The first sentence is "mysterious." Id., at 343. It has also been said, "[Section 107(e)(1)] appears internally inconsistent." Beazer East v. The Mead Corp., 34 F.3d 206, 211

(3d Cir.), reh'g denied (1994). Until this Court definitively clarifies Section 107(e)(1) of CERCLA, the mystery and uncertainty surrounding its intended meaning will persist.

Section 107(e)(1)'s enigmatic nature lies at the heart of why this Court should grant certiorari in this case. This Court has not addressed whether indemnification agreements between PRPs are prohibited under Section 107(e)(1) of CERCLA.

In addition to clarifying the meaning of Section 107(e)(1) of CERCLA, this Court should grant certiorari in this case in order to remedy the errors committed by the Seventh Circuit Court of Appeals. Specifically, the Seventh Circuit decided disputed, material factual issues in this case not yet addressed by either the parties or the District Court. Further, the Seventh Circuit did not

apply the proper rules of construction for indemnification agreements. By rectifying the errors committed by the Seventh Circuit, this Court will be able to clarify whether equitable factors -- in addition to indemnification agreements -- must be considered before equitably allocating liability among PRPs, whether post-CERCLA indemnification agreements must specify CERCLA or environmental liabilities to be effective, and whether state-law principles of contract interpretation, such as the canon that ambiguous indemnification agreements are to be construed against the drafter, should be applied. Finally, if not addressed, the Seventh Circuit's errors will bar Harley-Davidson's CERCLA claims against AMF and Minstar in connection with the cleanup of the York facility.

## I. THIS COURT HAS NOT DECIDED THE IMPORTANT QUESTION OF WHETHER SECTION 107(e)(1) OF CERCLA PERMITS INDEMNIFICATION AGREEMENTS BETWEEN POTENTIALLY RESPONSIBLE PARTIES.

The Supreme Court should grant Harley-Davidson's petition for writ of certiorari because the Seventh Circuit decided an important question of federal law that has not been, but should be, settled by the Supreme Court of the United States. Rule 10.1(c) of the Rules of the Supreme Court of the United States.

There are an estimated 40,000 hazardous waste sites awaiting federal evaluation and response. Steven Ferrey, The New Wave: Superfund Allocation Strategies and Outcomes, 25 Environment Reporter 790 n. 4(8/26/94)(citing U.S. EPA, CERCLA-3rd Quarter FY 92 Superfund Management Reporter, June 30, 1992). The average cleanup cost per site is approximately $25 million. EPA Enforcement, 23

Envtl. L. Rep. (Envtl. L. Inst.) 10,179, 10,251 (April 1993)(citing Department of Justice environmental enforcement statistic that site cleanups average nearly $25 million); Eve L. Pouliot, Coercion vs. Cooperation: Suggestions for the Better Effectuation of CERCLA (Superfund), 47 SMU L. Rev. 607, 638 (FN 145)(citing 40 C.F.R. pt. 300 (1992))(The average total cost of a remedial site cleanup is $27.8 million). Based on these estimates, the nationwide cleanup "bill" will total $1 trillion dollars. Undoubtedly, many of the parties saddled with those cleanup costs will look for contribution from other parties, including the purchasers and sellers of the polluted sites. Typically, purchasers and sellers of real estate attempt to allocate cleanup liability through use of indemnity clauses in purchase and sale contracts.

Despite the obvious need for clear, consistent law to guide contracting parties, courts and litigants, CERCLA's indemnification section -- Section 107(e)(1) -- remains shrouded in mystery. The Seventh Circuit's recent opinion in Harley-Davidson continued the pattern of federal district and appellate courts being forced to construct strained interpretations of an important, yet cryptic, statutory provision of CERCLA to resolve disputes between PRPs over how to equitably allocate cleanup costs.

Section 107(e)(1) of CERCLA provides:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or

> indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1).

Section 107(e)(1) of CERCLA should be definitively interpreted by this Court. Section 107(e)(1) can be, and has been, read to either prohibit indemnification agreements[2] or to permit such agreements.[3] See Danella South-

---

[2]E.g., Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. 978 (E.D. Wis. 1993), rev'd, 41 F.3d 341 (7th Cir.), reh'g denied (1994); CPC International, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D. Mich. 1991), reconsideration denied sub. nom, U.S. v. Cordova Chemical of Michigan, 1991 WL 111515 (W.D. Mich., March 26, 1991); AM Intern., Inc. v. International Forging Equipment, 743 F. Supp. 525 (N.D. Ohio 1990), rev'd in part, 982 F.2d 989 (6th Cir. 1993); Shapiro v. Alexanderson, 741 F. Supp. 472 (S.D.N.Y. 1990), reargument denied, 743 F. Supp. 268 (S.D.N.Y. 1990).

[3]E.g., Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir. 1994); Beazer East, Inc. v. Mead Corp., 34 F.3d 206 (3d Cir. 1994); Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10 (2d Cir. 1993); John S. Boyd Co., Inc., v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993); Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49 (2d Cir. 1993);

west v. Southwestern Bell Telephone, 775 F. Supp. 1227, 1240 (E.D. Mo. 1991), aff'd, 978 F.2d 1263 ("The first section of this obscure provision appears to prohibit indemnification agreements under all circumstances, while the second section appears to permit indemnification agreements under all circumstances"). This confusion should not be permitted to persist.

To date, eight United States Circuit Courts of Appeals have answered the question of whether indemnification agreements between potentially responsible parties are barred by Section 107(e)(1) of CERCLA.[4] Although it

---

U.S. v. Hardage, 985 F.2d 1427 (10th Cir. 1992).

[4]John S. Boyd, Inc. v. Boston Gas Co., 992 F.2d 401; Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10; Beazer East, Inc. v. Mead Corp., 34 F.3d 206; Joslyn Manufacturing Co. v. Koppers Company, Inc., 40 F.3d 750 (5th Cir. 1994); Niecko v. EMRO Marketing Co., 973 F.2d 1296 (6th Cir. 1992); Harley-Davidson,

is true that none of these courts have reached the conclusion set forth by the District Court in the case at bar, the majority of these courts have not undertaken a careful and well-reasoned analysis of the statute. Further, the courts of appeals do not uniformly agree on the proper method of interpretation of CERCLA Section 107(e)(1).

The history of the interpretation of CERCLA Section 107(e)(1) by the courts of appeals is rife with inadequate analyses of the statutory language. Instead, the courts have often reached conclusions without supporting rationale. See, e.g., U.S. v. Hardage, 985 F.2d 1427, 1433 (10th Cir. 1993)("The plain meaning of this language is that, although responsible parties may not

---

Inc. v. Minstar, Inc., 41 F.3d 341; Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986); U.S. v. Hardage, 985 F.2d 1427.

altogether transfer their CERCLA liability, they have the right to obtain indemnification for that liability"). Those conclusions are then relied upon by other courts and adopted without reasoned discussion. The result is a string of decisions reached without any real analysis, discussion or apparent reasoning.

For example, the Second Circuit's opinion in Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10 (2d Cir. 1993), merely adopted the underlying district court conclusion. The district court, in turn, arrived at its conclusion by adopting the Ninth Circuit's opinion in Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986). Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133, 1139 (S.D.N.Y. 1992), aff'd in part, vacated in part, 5 F.3d 10 (2d Cir. 1993).

However, the Ninth Circuit's opinion did not focus on the validity of indemnification agreements under CERCLA. Rather, the Mardan opinion addressed whether state law or federal common law governed the interpretation of agreements for indemnification of environmental liabilities. In fact, the extent of the Ninth Circuit's discussion of Section 107(e)(1), as it relates to the permissibility of indemnification agreements between PRPs, resides in a single sentence:

> "As the government points out, section 107(e)(1) expressly preserves agreements to insure, to hold harmless, or to indemnify a party held liable under section 107(a)."

Mardan Corp., 804 F.2d at 1459. There is no discussion, analysis, or reasoning contained within the Ninth Circuit's opinion to support its conclusion. Further, there is not even a mention of,

what other courts term, the "apparent internal inconsistency" of the language of CERCLA Section 107(e)(1). See, e.g., Beazer East, Inc. v. Mead Corp., 34 F.3d at 211 ("On first reading, this appears internally inconsistent").

A matter as important as the validity of indemnification agreements under CERCLA should not be allowed to be decided without reasoned analysis. This is a matter which should be specifically addressed and decided. There is no better forum for this matter to be definitively resolved than the Supreme Court.

In addition to the variance of conclusions reached by courts addressing CERCLA Section 107(e)(1), federal courts have also utilized different methods of interpreting the statutory language. One group in effect ignores Section 107(e)(1)'s first sentence,

simply finding that PRPs may allocate CERCLA liability. See Folino v. Hampden Color and Chemical Co., 832 F. Supp. 757, 760 (D. Vt. 1993); U.S. v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 1013 (D.S.C. 1984), Aff'd in part and vacated in part sub. nom., U.S. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

A second group of courts interpreting CERCLA Section 107(e)(1) finds, without explaining its method of interpretation, that the right of private parties to enter indemnification agreements is preserved. Commander Oil v. Advance Food Service Equipment, 991 F.2d 49, 51 (2d Cir. 1993); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d at 1458.

Yet another group of courts, recognizes the inconsistency of the two sentences of CERCLA Section 107(e)(1) and

acknowledges that the second sentence should modify the first. Unfortunately, these courts then employ an incorrect method of harmonizing the two sentences. Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d at 14; John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 405 (1st Cir. 1993); U.S. v. Hardage, 985 F.2d at 1433; AM Intern. v. International Forging Equipment, 982 F.2d 989, 994 (6th Cir. 1993), citing Niecko v. Emro Marketing Co., 973 F.2d 1296, 1300 (6th Cir. 1992).

Federal courts also have struggled with the concept of whether an environmental allocation agreement or indemnity clause must specifically reference "CERCLA-like" liability or at least environmental liability in order to satisfy CERCLA Section 107(e)(1). See, e.g., Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988)(no

"clear transfer or release of future 'CERCLA-like' liabilities"). Even though AMF entered into the 1980 indemnity agreement with AMF York after CERCLA was enacted, the contract did not refer to CERCLA in particular and did not mention environmental liability in general. A clear, express allocation of CERCLA liability between AMF and AMF York was lacking in the 1980 agreement. Nevertheless, the Seventh Circuit stated in the case at bar: "Harley-Davidson argues that the agreement is not broad enough to cover the contamination of the York site. But it could not be more broadly worded." Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d at 344. Given the CERCLA principle that the polluter should pay, the breadth of an indemnity clause should not be as important a factor in determining its enforceability under CERCLA Section 107(e)(1) as is the question of

whether it expressly and unequivocally allocates CERCLA liability.

Because CERCLA Section 107(e)(1) has not been subjected to a thorough analysis at the court of appeals level, and because courts throughout the United States are not in complete uniformity in either results or methods of interpretation, this Court should grant certiorari in this case.

Whether indemnification agreements between potentially responsible parties are prohibited by CERCLA Section 107(e)(1) -- or whether they are permissible only under certain situations -- will remain unresolved until this Court makes the final determination. By addressing the question of what Congress intended in CERCLA Section 107(e)(1), this Court would also have the opportunity to articulate whether other equitable factors in

addition to the existence of an indemnity contract should be considered when equitably allocating CERCLA liability between PRPs.

## II. THE SEVENTH CIRCUIT APPARENTLY DID NOT CONSIDER ANY EQUITABLE FACTORS OTHER THAN THE 1980 INDEMNIFICATION AGREEMENT BETWEEN AMF AND AMF YORK.

The method courts utilize to allocate liability between responsible parties under CERCLA is an important question that this Court should address. Until the Seventh Circuit's recent decision in Harley-Davidson, the Seventh Circuit indicated that in implementing Congressional intent courts should look to various equitable factors in determining allocation among responsible parties under CERCLA. The court's most recent opinion, however, appears to vitiate both its own precedent and legislative intent.

In Kerr-McGee Chemical v. Lefton Iron & Metal, 14 F.3d 321 (7th Cir.), reh'g denied (1994), the Seventh Circuit apparently recognized that contractual agreements between parties are not necessarily determinative of statutory liability. Id., at 326. Based on this principle, it follows that even if CERCLA Section 107(e)(1) allows contractual transfers of CERCLA liability, such contractual transfers will not necessarily serve to determine statutory liability.

The Seventh Circuit previously held that the following equitable factors, taken together, should be considered in allocating CERCLA Section 107 liability: (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous

waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; (6) the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment (all of the aforementioned constitute the so-called "Gore factors");[5] (7) the parties' relative

---

[5]The "Gore factors" were originally part of an amendment to the 1980 House Superfund Bill which did not pass. Environmental Transportation Systems, Inc. v. ENSCO, Inc., 969 F.2d 503, 508 (7th. Cir. 1992), citing U.S. v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984).

fault; and (8) any contracts between the parties bearing on the allocation of cleanup costs. Id., at n. 4.

The Seventh Circuit's recent opinion in Harley-Davidson, however, appears to contradict its earlier holding in Kerr-McGee. The Harley-Davidson opinion, in effect, appears to create a rule that a court may completely determine allocation among PRPs based solely on an indemnification agreement. Specifically, the Seventh Circuit concluded that the indemnification agreement between AMF York and AMF "bars Harley-Davidson's claim. . . ." Harley-Davidson, Inc. v. Minstar, Inc., 41 F. 3d at 344. Further, because this case was before the Seventh Circuit on interlocutory appeal, the District Court had not addressed the equitable factors listed above.

The Seventh Circuit held, in effect, that a broadly worded indemnification agreement obviates the need to inquire into any other equitable factors before allocating liability between responsible parties. While it is not disputed that the Seventh Circuit may overrule its own line of decisions, this Court should not uphold the Seventh Circuit's newest pronouncement of CERCLA law. The Seventh Circuit's holding contravenes legislative intent that other equitable factors be considered when equitably allocating liability between responsible parties.

The Seventh Circuit has noted that "the language and legislative history of the new contribution section [Section 113 of CERCLA] indicates, at the very least, Congress's intent that courts should equitably allocate costs of clean-up. . . ." Environmental Trans.

Systems v. Ensco, Inc., 969 F.2d 503, 508 (7th Cir. 1992)(citing U.S. v. Monsanto Co., 858 F.2d at 173 n. 29). The Seventh Circuit further stated, "Like the Court of Appeals for the Sixth Circuit, we think a court may consider any factors appropriate to balance the equities in the totality of the circumstances." Environmental Trans. Systems v. Ensco, Inc., 969 F.2d at 509 (citing U.S. v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991)).

The Seventh Circuit's own decisions, relying on decisions from other courts of appeals, show that courts should look at the "totality of the circumstances" and equitably allocate liability. As the Seventh Circuit observed, such a rule furthers the legislative intent behind Section 113(f) of CERCLA.

The Supreme Court should grant certiorari in this case in order to answer an important question of federal law. Specifically, this Court should determine whether a court, in allocating CERCLA liability among responsible parties, may ignore most of the relevant equitable factors -- to the point of not even hearing evidence on most of them -- and allocate purely on the basis of an indemnification agreement between the parties.

Thus, it would be inconsistent with Section 113 of CERCLA to bar Harley-Davidson's claims against Minstar and AMF before the District Court has considered the evidence and had an opportunity to equitably allocate CERCLA response costs among the parties.

## III. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COMMITTED JUDICIAL ERRORS IN THIS CASE THAT WILL GO UNREMEDIED IF THE SUPREME COURT DOES NOT GRANT CERTIORARI.

This Court should exercise its supervisory authority in this case because: (1) the Seventh Circuit either read only one of the two indemnification agreements essential to this case or tacitly decided disputed factual matters without permitting evidence to be taken by the District Court; and (2) the Seventh Circuit did not apply the applicable rule of contract interpretation in construing the one indemnification agreement it did consider. Exercising supervisory authority would be especially appropriate here, as the question of which law to apply when interpreting indemnification contracts -- federal common law or traditional state contract interpretation law -- is relevant to the standard the Court should

articulate for a federal district court to follow when applying CERCLA Section 107(e)(1) to an indemnification agreement between PRPs.

A. The Seventh Circuit Appears to Have Relied On Only One Of The Two Essential Indemnification Agreements In This Case.

The Seventh Circuit stated, "The buyer [AMF York and, subsequently, Harley-Davidson] had agreed to indemnify the seller against all liabilities relating to the division of the seller (called the AMF York Division) that owned the plant." Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d at 342. This seemingly innocuous statement reveals a serious error underlying the Seventh Circuit's opinion.

First, although only one was ever mentioned by the Seventh Circuit, there were two agreements between the parties containing indemnification

clauses. As noted earlier, the 1980 Acquisition Agreement between AMF and AMF York included the following indemnification language:

> AMF York Incorporated shall assume and discharge, and shall indemnify AMF Incorporated against all debts, liabilities and obligations, without any limitation, relating to AMF Incorporated's AMF York Division, its operations and products, whether known or unknown . . . and whether existing on the date of this agreement or coming into existence hereafter.

In addition, explicit language in a 1981 Purchase Agreement between Harley-Davidson and AMF provided the following indemnifications running from AMF to Harley:

> AMF agrees to indemnify and hold [Harley-Davidson] harmless against and in respect of: . . . (ii) any loss, liability or obligation . . . in connection with . . . (I) any liability or obligation of AMF or any of the Companies or the Subsidiaries arising out of or resulting

> from an event or occurrence happening prior to the Closing Date due to non-compliance with any Federal, state or local law, regulation, order or administrative or judicial determination relating to the environment. . . .

Section 10.5(a)(ii)(I) of 1981 Purchase Agreement. Further,

> AMF agrees to indemnify and hold [Harley-Davidson] harmless against and in respect of: . . . (ii) any loss, liability or obligation . . . in connection with . . . (G) any liability or obligation in connection with the golf car business, whether arising out of an even or occurrence happening prior to, on or after the Closing Date, in excess of applicable reserves in the Adjusted Closing Balance Sheet. . . .

Section 10.5(a)(ii)(G) of 1981 Purchase Agreement.

Even assuming the 1980 Acquisition Agreement's indemnification language would "bar[] Harley-Davidson's claim against these defendants," Harley-Davidson Inc. v. Minstar, Inc., 41 F.3d at 344, the indemnification to Harley-

Davidson, contained within the 1981 Purchase Agreement, preserves Harley-Davidson's right to demand at least some contribution from AMF and Minstar.

In order for the Seventh Circuit to reach the conclusion it did -- Harley-Davidson's claims against AMF and Minstar are barred -- the Seventh Circuit appears to have done one of two things: either (a) it completely ignored the indemnification provisions found in the 1981 Purchase Agreement; or (b) it found the 1981 Purchase Agreement inapplicable without stating any justification for doing so. In effect, the Seventh Circuit determined triable factual issues -- such as whether the liability related to the AMF York golf car business was in excess of the Adjusted Closing Balance Sheet -- without allowing the District Court to resolve those disputed issues of fact after developing the evidentiary record.

The Seventh Circuit took this case on interlocutory appeal. The narrow issue decided by the District Court, and briefed and argued by the parties, was limited to whether indemnification agreements are prohibited by Section 107(e)(1) of CERCLA. The factual record as to the other disputed issues is incomplete, as the parties involved expected the case to be remanded to the District Court to develop and determine the remaining questions of fact.

While the Seventh Circuit's authority to decide issues not specifically certified for interlocutory appeal is not questioned, Peterson v. Sealed Air Corp., 902 F.2d 1232, 1233 (7th Cir.), reh'g denied (1990), an appellate court should limit itself to deciding only issues plainly put forth in the record in as complete a form as is required for final determination of the

legal principles involved. 16 Charles A. Wright, et al., Federal Practice and Procedure, § 3921 (1977). In this case, the Seventh Circuit went beyond the factual record and committed prejudicial error.

Whether the Seventh Circuit ignored one of the two crucial indemnification agreements in this case -- documents both parties agreed were essential to the case -- or found the second agreement inapplicable, the Seventh Circuit appears to have departed from the accepted and usual course of judicial proceedings. This Court should exercise its supervisory power and correct the serious error committed in this case.

B. The Seventh Circuit Did Not Apply The Proper Rules For Construing Indemnification Agreements.

The second error underlying the Seventh Circuit's opinion in Harley-

Davidson is that the court did not apply the proper rule of interpretation for indemnification agreements. If the Seventh Circuit had properly applied the law of Pennsylvania, or even the law of any other state relevant to this case, it would have concluded that the indemnification language in the 1980 Purchase Agreement is ambiguous, and as such should be construed against AMF, the drafter of the ambiguous language.

While it is well settled that federal law governs issues relating to the validity of a release of a federal cause of action, Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 72 S. Ct. 312, 96 L.Ed. 398 (1952), every Court of Appeals addressing this issue has applied state rules of contract law in interpreting CERCLA indemnification agreements. Tippins Inc. v. USX Corp., 37 F.3d 87 (3d Cir. 1994); Fisher

Development Co. v. Boise Cascade Corp., 37 F.3d 104, 109 (3d Cir. 1994); Beazer East Inc. v. The Mead Corp., 34 F.3d 206; Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d at 14-15; John S. Boyd Co., Inc. v. Boston Gas Co., 992 F.2d at 406; United States v. Hardage, 985 F.2d at 1433 n. 2; Mardan Corp. v. C.G.C. Music Ltd., 804 F.2d at 1457-60.

Pennsylvania law should apply here because the York facility is located in Pennsylvania, AMF York was a Pennsylvania corporation, and Pennsylvania has the strongest governmental interest in the remediation of the York facility and, hence, the disposition of this case. See Restatement (Second) Conflict of Laws §§ 222, 224(2) (1971); Tippins Inc. v. USX Corp., 37 F.3d 87.

Pennsylvania law mandates that "while a party may contract for indemnification for its own torts, 'the language

in the indemnity provision must be clear and unequivocal and the burden is even greater where such party drafted the agreement.'" Tippins, Inc. v. USX, 37 F.3d at 91 n. 4(quoting DiPetro v. City of Philadelphia, 496 A.2d 407, 410 (Pa. Super. 1985)).

"A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 390 (1986). The express terms of the 1980 indemnification contract between AMF and AMF York limit the extent of indemnification to the AMF York Division, its operations and products. That clause does not address the operations or products of AMF's other divisions or subsidiaries which also polluted the York facility. Furthermore, the 1980 indemnification clause does not

speak to liabilities resulting from AMF's ownership of the York facility. Finally, the 1980 indemnification clause does not cover any potential CERCLA generator liability of AMF's divisions or subsidiaries, with the exception of the AMF York Division.

While Harley-Davidson contends that the 1980 indemnification contract -- if enforceable under CERCLA -- explicitly limits the indemnification running from Harley-Davidson to AMF York to those liabilities incurred by the York Division, the very least that can be said is that the 1980 indemnification contract is ambiguous. Because the indemnification contract is ambiguous, the Seventh Circuit should have construed it against AMF, the drafter of the indemnification clause.[6] The Seventh Circuit erred by

---

[6]All of the states relevant to this case -- Pennsylvania, Wisconsin, New York and New Jersey -- provide similar rules

construing the ambiguous 1980 indemnity agreement in favor of AMF.

The Seventh Circuit departed from the accepted and usual course of judicial proceedings by not adhering to the applicable law governing the interpretation of the indemnification language in this case. For this reason, this Court should issue a writ of certiorari in this case.

---

of interpretation for indemnification agreements. See, e.g., Spivey v. Great Atlantic & Pacific Tea Co., 255 N.W.2d 469 (Wis. 1977)(If a party seeks to be indemnified against its own negligence, then the indemnification agreement must specifically provide as such.); Gross v. Sweet, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365, 367 (Ct. App. 1979)(An exculpatory clause will not be deemed to insulate a party from liability for his negligent acts unless the intention of the parties is expressed in unmistakable language.); Ramos v. Browning-Ferris Industries of South Jersey, 103 N.J. 177, 191, 510 A.2d 1151 (N.J. 1986)(A contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms.).

## CONCLUSION

Granting certiorari in this case will allow the Supreme Court to enunciate a clear, nationwide standard for applying CERCLA Section 107(e)(1) to allocation contracts while at the same time remedying the errors of law contained in the Seventh Circuit's decision. Rectifying the Seventh Circuit's errors would further clarify the appropriate CERCLA 107(e)(1) standard for determining the enforceability of an indemnification agreement under CERCLA. Specifically, rectifying the Seventh Circuit's errors would allow this Court to determine whether federal district and appellate courts need to evaluate the totality of equitable circumstances, including all relevant contracts between the parties, before allocating liability between PRPs.

Further, by granting certiorari in this case, this Court would have the

opportunity to clarify the requirements a post-CERCLA indemnification agreement must satisfy to be effective and to specify whether federal courts must apply state law principles of contract construction, such as the canon that any ambiguity in an indemnification agreement must be resolved against the drafter, in this case, AMF, when evaluating the enforceability of such an agreement under CERCLA Section 107(e)(1).

For these reasons, Harley-Davidson respectfully requests that this Court issue a writ of certiorari in this case.

Respectfully submitted this 2nd day of February, 1995.

Jeffrey P. Clark
Counsel of Record
REINHART, BOERNER,
VAN DEUREN, NORRIS &
RIESELBACH, s.c.
1000 North Water Street
Milwaukee, Wisconsin 53202
414-298-1000
Attorneys for Petitioner

(2)

FILED

941321 FEB 2 1995

OFFICE OF THE CLERK

No. 95

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1994

---

HARLEY-DAVIDSON, INC.,

*Petitioner,*

v.

MINSTAR, INC., and AMF INCORPORATED,

*Respondents.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

---

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

---

Jeffrey P. Clark
Counsel of Record
REINHART, BOERNER,
VAN DEUREN, NORRIS &
RIESELBACH, s.c.
1000 North Water Street
Suite 2100
P.O. Box 92900
Milwaukee, Wisconsin 53202
(414) 298-1000

Attorneys for Petitioner

40 pp

CONTENTS OF APPENDIX

A. Decision of which review is sought: Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir.), reh'g denied (1994).

B. Grant of Stay of Mandate: Harley-Davidson, Inc. v. Minstar, Inc., Case No. 94-2171 (1/6/95).

C. Denial of Motion for Rehearing, with Suggestion for Rehearing En Banc: Harley-Davidson, Inc. v. Minstar, Inc., Case No. 94-2171 (12/28/94).

D. District Court decision: Harley-Davidson, Inc. v. Minstar, Inc., 837 F. Supp. 978 (E.D. Wis. 1993).

# In the
# United States Court of Appeals
## For the Seventh Circuit

No. 94-2171

HARLEY-DAVIDSON, INCORPORATED,

*Plaintiff-Appellee,*

*v.*

MINSTAR, INCORPORATED, and AMF INCORPORATED,

*Defendants-Appellants.*

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 90 C 1245—**Rudolph T. Randa**, *Judge.*

ARGUED OCTOBER 24, 1994—DECIDED NOVEMBER 30, 1994

Before POSNER, *Chief Judge*, BAUER, *Circuit Judge*, and WILL, *District Judge.**

POSNER, *Chief Judge.* Harley-Davidson, the plaintiff in this CERCLA suit (the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, commonly known as the Superfund statute), owns a manufacturing plant in York, Pennsylvania. Its predecessor had bought the plant from a predecessor of Minstar, Inc. and AMF Inc., related corporations that are the defendants-appellants. The buyer had agreed to indemnify the seller against all liabilities relating to the

* Hon. Hubert L. Will of the Northern District of Illinois.

division of the seller (called the AMF York Division) that owned the plant. Later the land on which the plant was located was found to be contaminated and Harley-Davidson was forced to incur clean-up costs. CERCLA entitles the owner of contaminated land to seek contribution from other persons who are responsible in whole or part for the contamination, so Harley-Davidson brought this suit against Minstar, AMF, and others. Minstar and AMF set up the indemnity agreement in defense, but the district judge ruled that the agreement was invalid under CERCLA and therefore was not a defense to Harley-Davidson's claim for contribution. 837 F. Supp. 978 (E.D. Wis. 1993). Although this was an interlocutory ruling, the district judge certified it for an immediate appeal under 28 U.S.C. § 1292(b), and we accepted the certification.

Section 107(e) of CERCLA states, in subsection (1): "No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from . . . any person who may be liable . . . under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e). Harley-Davidson directs our attention to the first sentence, which appears to invalidate indemnification agreements made by "responsible parties" (in the lingo of CERCLA), such as Minstar and AMF, while Minstar and AMF direct us to the second sentence, which appears to authorize precisely such agreements. The subsection taken as a whole is notably obscure, but we agree with every other appellate court that has been called on to interpret it that it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability. E.g., *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993). The first sentence speaks of "transfer[ring] . . . liability," that is, of shifting liability from one person to another. Indemnification does not do that. The indemnified

party remains fully liable to whomever he has wronged; he just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting.

It would be extraordinary if the draftsmen had wanted to bar insurance against CERCLA liability (insurance is just a form of indemnification). Public policy does on occasion demand that a wrongdoer be forbidden to shift the cost of liability to another through insurance or some other form of indemnification, but that is in cases of deliberate wrongdoing. *Truck Ins. Exchange v. Ashland Oil, Inc.*, 951 F.2d 787, 790 (7th Cir. 1992); *Western Casualty & Surety Co. v. Western World Ins. Co.*, 769 F.2d 381, 385 (7th Cir. 1985). Individuals and firms are normally allowed to insure against the consequences of their negligence; what else is automobile liability insurance? Proof of CERCLA liability does not require proof even of negligence, let alone of deliberate wrongdoing; CERCLA liability is strict. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 779 (7th Cir. 1992); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); see *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325-26 (7th Cir. 1994). Harley-Davidson flinches from the implications of its position, and, fastening on the word "insure" in the subsection's second sentence (it does not appear in the first sentence), argues that contracts of insurance are the one and only form of indemnification that the statute allows. But what sense would that make? Why would rational draftsmen allow a polluter to shift the cost of his liability to an insurance company but not to another polluter? Even the semantic argument is weak, since "insure" does not stand alone; the words are "to insure, hold harmless, *or indemnify*." Harley-Davidson wants us to strike words from the statute, and it had better have compelling reasons for such disfiguring surgery.

It points out that if indemnification (we would add, in the form of insurance as otherwise) is allowed, potential polluters will have less incentive to take steps to avoid

CERCLA liability, since they will be able to hand off all or part of the cost to the indemnitor. That of course is a problem with any form of insurance or indemnification. It is what is called moral hazard. When the problem is especially acute, insurance companies will not write insurance. *Western Casualty & Surety Co. v. Western World Ins. Co., supra,* 769 F.2d at 385. The law may even, as we noted, bar indemnification, as in cases of deliberate wrongdoing. The venerable requirement that an insured have an "insurable interest," the requirement that for example prevents a person from buying life insurance on the life of a stranger, *Connecticut Mutual Life Ins. Co. v. Schaefer,* 94 U.S. 457, 460 (1877), illustrates the concern with moral hazard. One can imagine, if barely, a decision by Congress that pollution is such an awful menace to society that polluters—even involuntary polluters—should be forbidden to insure. But there is no evidence of such a decision and it would be inconsistent with the second sentence, as well as with Harley-Davidson's concession that Minstar and AMF could have protected themselves with an insurance contract.

That leaves the first sentence unexplained. And it is mysterious. Indemnification does not, as we have already explained, "transfer" liability from the person indemnified. The latter remains fully liable to the victims of his wrongdoing. If a person buys automobile liability insurance and later is sued for damages arising out of an automobile accident, he cannot defend by saying, "I have insurance, so am not liable to you; go sue the insurance company." In most states the victim could not sue the insurance company if he wanted to. *National Union Fire Ins. Co. v. Baker & McKenzie,* 997 F.2d 305, 308 (7th Cir. 1993); *Truck Ins. Exchange v. Ashland Oil, Inc., supra,* 951 F.2d at 789. But in the legislative process leading up to the enactment of CERCLA, Congress considered allowing defendants in some cases to transfer liability to other responsible parties. S. Rep. No. 848, 96th Cong., 2d Sess. 44 (1980); Thaddeus Bereday, Note, "Contractual Transfers of Liability under CERCLA Section 107(e)(1): For Enforcement of

Private Risk Allocations in Real Property Transactions," 43 *Case W. Reserve L. Rev.* 161, 178-79, 204-07 (1992). The idea was dropped, and the first sentence of section 107(e)(1) may have been intended to make clear beyond any possibility of doubt that it was indeed dropped, that there is no transferring CERCLA liability. This is conjecture, but it is more plausible conjecture than anything that Harley-Davidson has offered us.

It has urged on us, however, an alternative ground for upholding the district judge's ruling barring Minstar and AMF from enforcing the indemnification agreement: that despite the breadth of the agreement, it is not in fact applicable to the clean-up costs that Harley-Davidson incurred at the York, Pennsylvania site. This ground was not considered by the district court, but that is no bar to our considering it. Any nonwaived ground may be urged on appeal in defense of a judgment. *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1976) (per curiam). This precept is as applicable to orders of which we have jurisdiction by virtue of 28 U.S.C. § 1292(b) as it is to any other orders. *Edwardsville National Bank v. Marion Laboratories, Inc.*, 808 F.2d 648, 651 (7th Cir. 1987); cf. *Miller v. Bolger*, 802 F.2d 660, 666-67 (3d Cir. 1986). Normally, it is true, we review only final judgments (final "decisions" in the language of 28 U.S.C. § 1291). But if an interlocutory order is properly before us, the reason for considering alternative grounds for affirmance of a final judgment is equally present. It is pointless to reverse the district court if it is apparent that when the case is remanded, that court will have to reinstate its order because the party that obtained it in the first round is indeed entitled to it, albeit on a different ground from the one initially adopted by that court.

The question that Harley-Davidson asks us to answer regarding the scope of the indemnification agreement depends simply on the wording of the agreement interpreted in light of applicable state law governing indemnification agreements; there is no question of federal law. E.g., *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212-15 (3d

Cir. 1994); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 14-15 (2d Cir. 1993); *American Policyholders Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1263-64 (1st Cir. 1993). Harley-Davidson argues that the agreement is not broad enough to cover the contamination of the York site. But it could not be more broadly worded. It says that "[Harley-Davidson] shall . . . indemnify AMF INCORPORATED against all debts, liabilities, and obligations, without any limitation, relating to AMF INCORPORATED's AMF York Division, its operations and products, whether known or unknown, . . . and whether existing on the date of this agreement or coming into existence hereafter." The arguments that Harley-Davidson makes against taking the words in their natural meaning are makeweights, illustrated by its argument that other divisions of the defendants' predecessor may have been responsible for the contamination—the York Division merely owned the site, and the agreement refers to York's "operations and products." Yes, but the operative wording is "relating to . . . [the] York Division, its operations and products," and liability arising from the contamination of land owned by the York Division "relat[es]" to the York Division. The applicability of the agreement is supported by decisions construing similar agreements in other CERCLA cases. *Olin Corp. v. Consolidated Aluminum Corp.*, *supra*, 5 F.3d at 15-16; *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1461-63 (9th Cir. 1986).

The indemnification agreement is enforceable and applicable, and bars Harley-Davidson's claim against these defendants.

REVERSED.

A true Copy:

Teste:

---

*Clerk of the United States Court of Appeals for the Seventh Circuit*

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—11-30-94

# United States Court of Appeals

***For the Seventh Circuit***
***Chicago, Illinois 60604***

January 6, 1995

*Before*

**Hon.** RICHARD A. POSNER, *Chief Judge*

| | | |
|---|---|---|
| HARLEY-DAVIDSON, INCORPORATED, Plaintiff-Appellee, | ] | Appeal from the United States District Court for the Eastern District of Wisconsin. |
| No. 94-2171 v. | ] | |
| MINSTAR, INCORPORATED, a Delaware corporation and AMF INCORPORATED, a New Jersey corporation, Defendants-Appellants | ] | No. 90 C 1245 |
| | ] | Rudolph T. Randa, Judge. |

Upon consideration of the **"MOTION FOR STAY OF MANDATE"** filed 1/3/95, by counsel for the appellee,

IT IS ORDERED that the motion is GRANTED and the mandate is STAYED to the including 2/5/95 to allow appellee to file a Petition for a Writ of Certiorari with the U.S. Supreme Court.

**United States Court of Appeals**

For the Seventh Circuit

Chicago, Illinois 60604

December 28, 1994

Before

Hon. Richard A. Posner, Chief Judge

Hon. William J. Bauer, Circuit Judge

Hon. Hubert L. Will, District Judge *

| | | |
|---|---|---|
| HARLEY-DAVIDSON, INCORPORATED, *Plaintiff-Appellee,* | } | Appeal from the United States District Court for the Eastern District of Wisconsin. |
| No. 94-2171 v. | } | No. 90 C 1245 Rudolph T. Randa, *Judge.* |
| MINSTAR, INCORPORATED, and AMF INCORPORATED, *Defendants-Appellants.* | } | |

**ORDER**

On December 14, 1994, plaintiff-appellee filed a petition for rehearing with a suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges** has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

* Hon. Hubert L. Will, of the Northern District of Illinois, sitting by designation.

** Hon. Walter J. Cummings did not participate in the consideration of the petition for rehearing en banc.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

---

HARLEY-DAVIDSON, INC.,

Plaintiff,

vs. Case No. 90-C-1245

MINSTAR, INC.
AMF INCORPORATED,
the UNITED STATES OF
AMERICA,
the UNITED STATES
DEPARTMENT OF
DEFENSE and the UNITED
STATES
DEPARTMENT OF THE NAVY,

Defendant.

---

**DECISION AND ORDER**

---

This case involves a dispute between Plaintiff, Harley-Davidson, Inc., ("Harley-Davidson"), and Defendants Minstar, Inc., ("Minstar"), AMF, Inc., ("AMF"), U.S.A., U.S. Department of Defense, and the U.S. Department of the Navy (collectively, "the Navy"), over liability for clean-up of a contaminated industrial site. The dispute centers on

two agreements[1] and a settlement in State Court arising from one of the agreements. Minstar and AMF assert that the Agreements effectively transferred liability and, hence, the cost of clean-up from Minstar and AMF to Harley-Davidson. Harley-Davidson acknowledges the Agreements, disputes their meaning, and argues that the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) negates Minstar-AMF's contractual transfer of liability. Harley-Davidson seeks recovery of its response costs under CERCLA, and a declaration of the liability of all parties under CERCLA and the two Agreements.

---

[1]The two agreements are a 1980 Acquisition Agreement ("1980 Agreement") whereby AMF transferred all the assets and liabilities of its York Operation to AMF-York and a 1981 Purchase Agreement ("1981 Agreement") under which AMF sold its stock in AMF-York and related assets to Harley-Davidson.

Minstar and AMF move the Court for judgment on the pleadings which, pursuant to a subsequent Order of Judge J.P. Stadtmueller, was transformed into a Motion for Summary Judgment.[2]

**FACTS**

The genealogy for this industrial site is rather short, considering that it has been used as such since 1944. In 1944 the Navy took title to the industrial site in question now known as the York Facility. From 1944 to 1964, the Facility was operated as the York Naval Ordinance Plant. The United States sold the facility to AMF on

---

[2]This case was originally assigned to Judge J.P. Stadtmueller but later transferred to this Court. After hearing oral argument on the motion for judgment on the pleadings, Judge Stadtmueller asked for supplementation of the record which resulted in the motions as they currently stand before the Court. Whether labeled a Motion for Judgment on the Pleadings or Motion for Summary Judgment is of no consequence as will be made clear from the ruling.

January 31st, 1964. In 1980, AMF transferred the York Facility by a Quitclaim Deed to a wholly owned subsidiary, AMF York, Incorporated ("AMF York"). Paragraph three of the 1980 Agreement provided that AMF York "shall assume and discharge and shall indemnify AMF Incorporated against all debts, liabilities and obligations without limitation relating to AMF Incorporated's AMF York Division, its operations and products, whether known or unknown". On June 16, 1981, AMF transferred the Facility to Harley-Davidson. Minstar acquired AMF in 1985.

All three owners of the Facility, the Navy, AMF, and Harley-Davidson have performed manufacturing operations there. In 1986, Harley-Davidson conducted an environmental audit at the Facility and discovered environmental contamination. Since 1986,

Harley-Davidson has responded to the contamination under the supervision of the Pennsylvania Department of Environmental Resources. Harley-Davidson alleges that the contamination at the Facility is attributable to the activities of the prior owners, operators and successors in interest (the Navy, AMF and Minstar).

Harley-Davidson filed this action pursuant to CERCLA Sections 107 and 113, 42 U.S.C. § 9607, 9613, naming the Navy, AMF, and Minstar as defendants. As previously indicated, Harley-Davidson seeks recovery of its response costs and a declaration of liability. An Amended Complaint was filed by Harley-Davidson containing an additional count against Minstar and AMF based on the Pennsylvania Hazardous Sites Clean-up Act. ("PAHSCA")[3]

---

[3]PAHSCA parallels CERCLA in general and, as argued by Minstar and AMF, is "virtually identical" to Sec. 107(e) of

While alleging that Harley-Davidson was responsible for the contaminated site, AMF and Minstar also alleged that they had discharged all of their obligations to Harley-Davidson for environmental contamination at the York Facility pursuant to the 1980 and 1981 Purchase Agreements.

Under the 1981 Agreement, AMF agreed to "retain and be responsible for the liabilities and obligations in respect of the related assets against and in respect of which AMF is idemnifying (Harley-Davidson) pursuant to Sec. 10.5(a)." 1981 Agreement, Sec. 2.2. The liabilities and obligations for which Harley-Davidson was indemnified included any loss, liability, or obligation in connection with AMF's liabilities "arising out of or resulting from an

---

CERCLA. Interpretation of Sec. 107(e) of CERCLA is central to this decision.

event or an occurrence . . . due to non-compliance with any Federal, State, or local law, regulation, order or administrative or judicial determination relating to the environment . . ." prior to transfer of the property to Harley-Davidson. 1981 Agreement Sec. 10.5(a)(1). These Agreements were the subject of the aforementioned State action brought by Harley-Davidson in Wisconsin State Court. Harley-Davidson, Inc., v. Minstar, Inc., No. 90-CV-004063 (Milwaukee Circuit Court, Wisconsin, filed March 23, 1990), which has subsequently been settled.[4]

---

[4]Pursuant to this Settlement, Minstar agreed to pay $1,900,000 towards the investigation and clean-up work at the York Plant by April 15, 1991, and also agreed to pay the lesser of 60% of project costs or $125,000 for each successive calendar quarter (Settlement Agreement, ¶ 1-3). Minstar agreed to continue such payments until a total of all project costs paid by Minstar under the Agreement equals the lesser of $4,000,000 or 60% of final project costs. (¶ 4). The parties stipulated that the

The 1980 and 1981 Agreements and the settlement of the State Court litigation are the basis for AMF's and Minstar's present motion. AMF and Minstar contend that the Agreements comprise Harley-Davidson's exclusive remedy against them for pre-acquisition environmental problems and that the settlement of the State Court action precludes Harley-Davidson's CERCLA action. In other words, AMF and Minstar

---

payments under the Settlement Agreement would satisfy all the relevant indemnity obligations of AMF and Minstar under the 1981 Purchase Agreement (¶ 5-7). The parties agreed to dismiss with prejudice all claims in the State Court action. The parties also agreed that Minstar's and AMF's potential liabilities under CERCLA, if any, which were the only claims then pending in the Federal Court case would be resolved separate from the Settlement Agreement. The Settlement Agreement provides that payments thereunder are a credit against any CERCLA liability. From the outset, AMF and Minstar have taken the position that Harley-Davidson's CERCLA claims are precluded by the 1980 and 1981 Agreements.

argue that they have, as recognized potentially responsible parties under CERCLA, successfully transferred and satisfied the liability they may owe under CERCLA to Harley-Davidson, another potentially responsible party.

**ANALYSIS**

Because the Court interprets Sec. 107(e) of CERCLA to preclude the contractual transfer of liability between parties responsible or potentially responsible for the clean-up of contaminated sites, Minstar and AMF cannot rely on the 1980 and 1981 Agreements or the State Court settlement arising therefrom to avoid any further liability it may have under the Statute.[5]

---

[5]Depending on the total response costs, Minstar and AMF's current and obligated contributions may satisfy the liability that is ultimately attributed to them.

The conclusion that this Court reaches is considered the "minority" view. However, the Court accepts this view for the following reasons:

Although the stated purpose of CERCLA is clear some of its sections, in particular Sec. 107(e)(1), have been, judging from the amount of differing opinions, elusive in their meaning. The meaning of Sec. 107(e)(1) becomes readily clear, however, through an application of the language of the statute itself and the proper canons of statutory construction. Since the meaning of Sec. 107(e)(1) is discernible from these sources and is consistent with the objective of the law, there is no need to delve into its legislative history.[6] The

---

[6]While the legislative history seems to support this Court's conclusion, it is ambiguous. "[N]ot the least of the defects of legislative history is its indeterminacy". Conroy v. Aniskoff, 113 S. Ct. 1562, 1567 (1993). Indeed, if we

primary guide for interpreting Sec. 107(e)(1), therefore, must be the language of Sec. 107(e)(1). "The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . ." Conroy, 113 S. Ct. at 1567, quoting Aldridge v. Williams, 3 Howard 9, 24 (1844).

With this in mind, we look at the language of CERCLA. Under Sec. 107(a) there are four categories of potentially responsible parties. The current owner and operator of a contaminated site, the owner or operator of that site when contamination occurred, the generators of the waste sent to the

---

follow the direction of Justice Scalia in the concurring opinion in Conroy, we should not consider legislative history at all. "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." Id.

contaminated site, and the transporters of the waste sent to the contaminated site.[7]

---

[7]Sec. 107(a) of CERCLA reads as follows: "Liability. (A) Covered Persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -- (1) the owner and operator of vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other

Sec. 107 (e)(1) states:

**Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights**

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for release or threat of release under this section to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.[8]

---

person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title." 42 U.S.C.A. § 9607(a) (Supp. 1993).

[8]Subsection (2) of Section 107 goes on to state: "Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a

42 U.S.C.A. § 9607(e)(1).

Taking up the first sentence of 107(e)(1), it is clear that the language proscribes any transfer "to any other person the liability imposed under this section".[9] This all-inclusive language precludes, unless clarified elsewhere, not only the transfer of "the liability imposed under this section" between potentially responsible parties, but the transfer between a potentially responsible party and a party not liable under the law.[10] Therefore, regardless of

---

guarantor, has or would have, by reason of subrogation or otherwise against any person." 42 U.S.C.A. § 9607(e)(2).

[9]The first sentence of Sec. 107(e)(1) contains the wording "liability imposed under this section". The second sentence of 107(e)(1) contains the wording "liability under this section." They obviously have the same meaning and may be interchanged.

[10]As the Court in Jones-Hamilton Company v. Kop-Coat, Inc., 750 F.Supp. 1022, 1025 (N.D.Cal. 1990) stated, "the first sentence of Sec. 107(e)(1) appears to prohibit indemnification agreements

the nature of the liability imposed under this section, the transfer of that liability to "any other person" is proscribed. Courts considering only the first sentence are universal in their opinion that no other meaning could be drawn from this language. Standing alone, the first sentence is clear and unambiguous and draconian in its approach.

In turn, the second sentence of Sec. 107(e)(1), which by definition should be a qualifier of the lead first sentence[11] and therefore either explain or

---

under all circumstances . . ." The Jones court went on to state, ". . . the second sentence of Sec. 107(e)(1) appears to permit indemnification under all circumstances". This is taken up infra.

[11]Due to its position and language, the second sentence should be deemed a qualification of the first. It begins with the words "Nothing in this section . . .", suggesting its use as a qualifying sentence and not as a lead or primary sentence. Indeed, to give the second sentence independence from the first sentence, and thus primacy of

modify the first sentence, appears at first glance to contradict it. The second sentence of 107(e)(1) states:

> Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C.A. § 9607(e)(1).

Some Courts have dealt with this apparent contradiction by reading the second sentence of 107(e) as a primary sentence, thereby permitting the transfer of liability between all parties and not just between potentially responsible parties. Reading the language of the second sentence in this manner permits the transfer of liability in all cases but it also, as a matter of

---

meaning over the first sentence, goes against basic principles of composition, logic and statutory construction. See e.g., In re Etchin, 128 B.R. 662 (Bankr. W.D. Wis. 1991) ("a qualifying phrase must be applied to the words or phrases immediately preceding it").

course, negates the first sentence completely. In this it flies in the face of basic statutory and grammatical construction. Indeed, other Courts have dealt with this negation by simply ignoring the language of the first sentence altogether. See e.g., Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31 (7th Cir. 1987); Versatile Metals, Inc. v. Union Corporation, 693 F. Supp. 1563 (E.D. Pa. 1988); FMC Corporation v. Northern Pump Company, 668 F. Supp. 1285 (D.Minn. 1987); Mardan Corporation v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986)(where Court assumed the right to contractually transfer liability between potentially responsible parties); Rodenbeck v. Marathon Petroleum Co., 742 F.Supp. 1448 (N.D.Ind. 1990)(where the provisions in question were essentially ignored).

The second sentence of Sec. 107(e)(1) cannot be read as other than a qualifier of the first sentence because statutory sections must be read to establish consistency with each other. Statutes should not be interpreted so as to render one part inoperative, superfluous, or insignificant. In re Gasteiger, 471 F. Supp. 13, 15 (E.D. Tenn. 1977). To give the second sentence independent meaning and/or to ignore the first sentence is to make the first sentence, which is an all inclusive lead sentence, truly "inoperative, superfluous and insignificant". Id. If inconsistency can be avoided or consistency achieved by one manner of reading the language of the statute, it should be done. All parts of the statute should be given affect. Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961).

Other Courts, in an attempt to reconcile the two sentences and observe the foregoing basic standards of statutory construction, have properly recognized the second sentence as a qualifier or modifier of the first. They have "squared" the language of the second sentence with that of the first by positing that the "liability imposed under this section" language contained in the first sentence of 107(e)(1) is a liability imposed by, and owed to, the U.S. Government. Thus, it is reasoned, as long as the liability owed to the Government is in no way diminished, the second sentence of this Section allows the transfer of the <u>costs of that liability</u> to another potentially responsible party. This interpretation, the reasoning continues, preserves the internal logic of the subsection, observes proper principles of statutory

construction, and maintains the objective of the statute. For instance, the Court in Niecko v. Emro Marketing Company, 973 F.2d. 1296 (6th Cir. 1992) relied heavily on legislative history and held:

> [T]he first sentence insures the clean-up is performed and those responsible cannot escape their liability for cleaning the property. However, in terms of financial liability, the parties may allocate the costs of the clean-up between them . . . [T]his is a more palatable and consistent interpretation . . . because it allows the two sentences to be read as internally consistent.

Id., at 1301 (Emphasis supplied.)

In addition, the 6th Circuit in AM International, Inc. v. International Forging Equipment Corporation, 982 F.2d 989 (6th Cir. 1993), again relying on legislative history,[12] specifically

---

[12]For an example of the opposite conclusion suggested by Niecko's reading of legislative history, see 126 Cong.Rec. 30, 984 (1980) and an exchange between Senators Cannon and Randolph (a sponsor of the bill), wherein it was their

overturned the District Court which adopted the conclusions reached here. The Court stated that its reading of the statutory language, proposed first in Niecko,

> "seems to us to make sense both in logic and as a matter of public policy.[13] The

---

understanding that contractual transfer of liability between potentially responsible parties was precluded. Indeed, this is apparently the only legislative history that discusses the seeming contradiction of the sentences.

[13]The Court would note that effective public policy arguments can be made for both positions. See, for example, the District Court opinion in AM International, 743 F. Supp. 525 (N.D.Oh. 1990). The AM International Court determined that its interpretation of Sec. 107(e) was consistent with the policy of galvanizing potentially responsible parties to rapidly clean up contaminated sites. In addition, see commentaries such as 75 Minn. L. Rev. 1571, wherein it is argued, among other things, that "national uniformity" is achieved by the District Court's position. On the other hand, see 43 Case Western Reserve L. Rev. 161, arguing that private risk allocation should be and would be encouraged by allowing the transfer of liability between potentially responsible parties.

> underlying purposes of the statutory language under scrutiny is to ensure that responsible parties will pay for the clean-up and that they may not avoid liability to the government by transferring this liability to another. However, this purpose is not inconsistent with parties responsible for the clean-up transferring or allocating among themselves the costs associated with this liability so long as they remain liable to the third party who can demand the clean-up. This is what is permitted by the second sentence--the shifting or allocation of the risk of the cost of liability between potentially responsible persons without diluting CERCLA liability for the clean-up itself.

Id. at 994. (Emphasis supplied.)

Although correctly recognizing the second sentence as necessarily a qualifying sentence,[14] the foregoing analysis misinterprets the meaning given by the statute itself to the language

---

[14]As was stated in AM International, "the second sentence (of Sec. 107(e)(1)) provides an exemption which narrows the scope of the first". Am International, 982 F.2d at 995.

"liability under this section". Section 107(a) defines that liability and clearly states that a potentially responsible party shall be liable for:

> (A) all costs of removal or remedial action incurred by the United States Government . . .;
> (B) any other necessary costs of response incurred by any other person. . . .

42 U.S.C.A. § 9607(a)(4)(A)&(B) (Supp. 1993). Thus, the very distinction cases like Niecko and AM International seek to draw between the liability owed to the Government and the liability owed to other responsible parties cannot be drawn because both are "liabilit[ies] imposed under this section" that cannot be transferred. The Niecko and AM International Courts, in seeking to transfer the "risk, of the cost of liability" or the "costs associated with this liability" (AM International) or the "financial liability" or "costs of the

clean-up" (Niecko) between potentially responsible parties, are really seeking to transfer the "response costs incurred by any other person", which is proscribed by Sec. 107(e)(1) an Sec. 107(a).

Thus, under a plain reading of the statute, the liability which cannot be transferred by a potentially responsible party under the first sentence of Sec. 107(e)(1) is a duty to contribute to the costs "incurred by the United States Government" or the "costs of response incurred by any other person". The phrase "liability imposed under this section" does not make a distinction between "financial liability" or the "costs of liability" and another liability owed to the Government. The liability owed is the cost that the Government or another party incurs in the way of response and other costs. Therefore, the "liability imposed under

this section", and that which cannot be contracted away to another potentially responsible party, are the very costs (incurred by the Government or any other person) that the majority view deems separate from a liability owed to the Government. The statute is clear as to what the non-transferable liability is, and the language of the statute defining liability precludes the alternative suggested by the majority view.

Because the main thrust of Sec. 107(e)(1) is primarily to prevent the transfer of costs that a potential responsible party owes to the Government or another potential responsible party, the only question that remains is whether or not the phrase "to any other person" in the first sentence prevents the transfer of that liability to a non-potentially responsible party. Because the second sentence is read as a modifier

of the first sentence (or as stated by AM International "narrows the scope of the first sentence", supra) and because it cannot and does not modify the definition of liability given in Sec. 107(a), it must modify and does modify the language "any other person" in the first sentence. Read this way, the second sentence permits the transfer of liability owed by a potentially responsible party to a non-liable or non-potentially responsible party, such as an insurance company.

The latter interpretation gives Sec. 107(e)(1) a greater consistency for it relies more completely on the language of the statute itself and not at all on "appropriate" public policy or inconclusive legislative history. It is also consistent with the strict liability nature of the statute[15] and is congruent

---

[15]CERCLA imposes a standard of strict liability. CERCLA Sec. 101(32), 42 U.S.C. Sec. 9601(32) states: "The

with the narrow defenses allowed in any CERCLA action.[16] This interpretation

---

terms liable or liability under this Subsection shall be construed to be the standard of liability which obtains under section 1321 of Title 33 [the Clean Water Act]." Though not explicitly stated, Courts have concluded that a standard of strict liability prevails under the Clean Water Act. U.S. v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978).

[16]Sec. 107(b) defenses: "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or then one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs."

also lends a consistency to Sec. 107(e)(2)[17] and is in keeping with the tenor of the Act that more parties rather than less should be held accountable.

For the foregoing reasons, the Court concludes that the first sentence of Sec. 107(e) precludes the use of any indemnification, hold harmless or similar agreement to contractually transfer the liability that one potentially responsible party owes to the Government or another potentially responsible party.

It further concludes that the second sentence of Sec. 107(e) permits indemnification, hold harmless and similar agreements between a potentially responsible party and a party not otherwise liable under Sec. 107(a).[19]

---

[17]See Footnote 8, supra.

[19]Nothing in the second sentence expressly defines the term "party". However, as the Court discussed supra, because the second sentence is a

**NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:**

1. Minstar and AMF's motion to dismiss and motions for summary judgment are denied;

2. The parties rights are declared as stated;

3. Allocation of costs will be subsequently determined by the Court pursuant to Sec. 113 and other relevant standards in CERCLA.

Dated at Milwaukee, Wisconsin, this 5th day of November, 1993.

**So ORDERED,**

Rudolph T. Randa
Hon. Rudolph T. Randa,
U. S. District Judge

---

"qualifying" sentence, it can only mean that a non-potentially responsible party can insure or hold harmless a potentially responsible party liable to the Government or another potentially responsible party.

Supreme Court, U.S.
FILED
MAR 6 1995
OFFICE OF THE CLERK

No. 94-1321

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

---

HARLEY-DAVIDSON, INC.,
*Petitioner,*

v.

MINSTAR, INC., and AMF INCORPORATED,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

J. ANDREW SCHLICKMAN *
GERARD D. KELLY
JAMES E. TAYLOR
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JOHN W. HEIN
DAVID J. EDQUIST
GIBBS, ROPER, LOOTS
& WILLIAMS, S.C.
735 North Water Street
Milwaukee, Wisconsin 53202
(414) 273-7000

*Counsel for Respondents*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

## LIST OF AFFILIATED CORPORATIONS

Pursuant to Supreme Court Rule 29.1, following is a list of the parent corporations and non-wholly owned subsidiaries of each respondent:

Minstar, Inc.: Genmar Holdings, Inc., is the parent corporation of Minstar, Inc. Minstar, Inc., has no non-wholly owned subsidiaries.

AMF Incorporated: Minstar, Inc. is the parent corporation of AMF Incorporated. AMF Incorporated has no non-wholly owned subsidiaries.

## TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTERSTATEMENT OF THE CASE | 1 |
| REASONS WHY THE PETITION SHOULD BE DENIED | 3 |
| I. EIGHT CIRCUIT COURTS HAVE UNANIMOUSLY AND CORRECTLY CONCLUDED THAT SECTION 107(e) OF CERCLA DOES NOT BAR ENFORCEMENT OF PRIVATE INDEMNIFICATION AGREEMENTS AMONG PRPs | 3 |
| II. THERE IS NO CONFLICT WITHIN THE SEVENTH CIRCUIT, AND EVEN IF THERE WERE SUCH A CONFLICT, CERTIORARI WOULD BE INAPPROPRIATE | 7 |
| III. THE PROPER INTERPRETATION OF THE DOCUMENTS HERE AT ISSUE DOES NOT PRESENT A QUESTION OF GENERAL IMPORTANCE | 8 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES


| *CASES* | Page |
|---|---|
| *AM Int'l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989 (6th Cir. 1993) | 4, 6 |
| *Armotek Indus., Inc. v. Freedman*, 790 F. Supp. 388 (D. Conn. 1992) | 4 |
| *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206 (3d Cir. 1994) | 4, 6 |
| *Bowen Eng'g v. Reeve*, 799 F. Supp. 467 (D. N.J. 1992), *aff'd mem.*, 993 F.2d 223 (3d Cir. 1993), *aff'd mem.*, 19 F.3d 642 (3d Cir. 1994) | 4 |
| *Chemical Waste Management, Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285 (E.D. Pa. 1987) | 5 |
| *Commander Oil Corp. v. Advance Food Service Equip.*, 991 F.2d 49 (2d Cir. 1993) | 4 |
| *Davis v. United States*, 417 U.S. 333 (1974) | 7 |
| *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104 (3d Cir. 1994) | 4 |
| *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987) | 5 |
| *Fox River Grove, Ill. v. Grayhill, Inc.*, 806 F. Supp. 785 (N.D. Ill. 1992) | 4 |
| *Harley-Davidson, Inc. v. Minstar, Inc.*, No. 94-CV004063 (Milwaukee Cir. Ct. Wis.) | 2 |
| *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341 (7th Cir. 1994) | 4 |
| *Hatco Corp. v. W.R. Grace & Co.*, 801 F .Supp. 1309 (D. N.J. 1992) | 4 |
| *In Re Hemingway Transp., Inc.*, 126 Bankr. 650 (D. Mass. 1991) | 4 |
| *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993) | 4, 5 |
| *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 688 (9th Cir. 1992) | 4 |
| *Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d 750 (5th Cir. 1994) | 4 |
| *Kaufman and Broad-South Bay v. Unisys. Corp.*, 822 F. Supp. 1468 (N.D. Cal. 1993) | 4 |
| *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994) | 7, 8 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Keywell Corp. v. Weinstein*, 33 F.3d 159 (2d Cir. 1994) | 4 |
| *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986) | 4 |
| *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345 (D. N.J. 1991) | 4 |
| *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296 (6th Cir. 1992) | 4 |
| *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10 (2d Cir. 1993) | 4 |
| *Robertshaw Controls Co. v. Watts Regulator Co.*, 807 F. Supp. 144 (D. Me. 1992) | 4 |
| *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448 (N.D. Ind. 1990) | 4 |
| *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D. N.J. 1988) | 4 |
| *Town of Munster, Ind. v. Sherwin Williams Co., Inc.*, 27 F.3d 1268 (7th Cir. 1994) | 4 |
| *United States v. Hardage*, 985 F.2d 1427 (10th Cir. 1993) | 4, 5 |
| *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D. S.C. 1986), *aff'd in part and vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988) | 5 |
| *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563 (E.D. Pa. 1988) | 4 |

*Statutes*

| | |
|---|---|
| Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607 | *passim* |
| Section 113 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9613 | 8 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

---

No. 94-1321

---

HARLEY-DAVIDSON, INC.,
*Petitioner,*

v.

MINSTAR, INC., and AMF INCORPORATED,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Respondents Minstar, Inc. ("Minstar"), and AMF Incorporated ("AMF") respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioner Harley-Davidson, Inc. ("Harley-Davidson"), seeking review of the Seventh Circuit's opinion in this case. That opinion by Chief Judge Posner is reported at 41 F.3d 341 (1994) and can also be found at pages A-1 through A-6 of the Appendix to Harley-Davidson's Petition.

## COUNTERSTATEMENT OF THE CASE

Harley-Davidson's statement of the case does not contain any material inaccuracies regarding the background of the primary legal issue in this action—whether Section

107(e) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(e), precludes contractual allocations or indemnifications among potentially responsible parties ("PRPs") regarding the costs of CERCLA liability. With respect to a secondary argument raised by Harley-Davidson concerning the specific contractual arrangements between Harley-Davidson and AMF, however, Harley-Davidson's statement of the case is materially inaccurate and incomplete.

Harley-Davidson asserts that "AMF sold the York Facility to Harley-Davidson, via [the 1981] Purchase Agreement." (Pet. p. 9). In fact, under the 1981 Purchase Agreement AMF sold, *inter alia*, all of the *stock* of two subsidiaries, one of which owned the York Facility, to Harley-Davidson's corporate predecessor. The predecessor subsequently merged with the former AMF subsidiaries to become what is now Harley-Davidson. In addition, Harley-Davidson fails to mention that AMF's obligations under the indemnification provision contained in Section 10.5(a)(ii)(I) of the 1981 Purchase Agreement described by Harley-Davidson (Pet. pp. 9-10) were subject, along with certain other indemnification provisions, to an aggregate cap of $7,000,000.

Most significantly, Harley-Davidson neglects to mention that, on March 23, 1990, it sued Minstar in Wisconsin state court seeking to recover, under Section 10.5(a)(ii)(I) and other provisions of the 1981 Purchase Agreement, its cleanup costs relating to the York Facility—the same costs that Harley-Davidson now asserts cannot be allocated by private agreement under Section 107(e) of CERCLA. *Harley-Davidson, Inc. v. Minstar, Inc.*, No. 90-CV004063 (Milwaukee Cir. Ct., Wis.) (hereinafter the "State Court Action"). On March 14, 1991, Minstar and Harley-Davidson executed a Settlement Agreement resolving the State Court Action, under which Minstar paid $1.9 million toward the cleanup of the York Facility, and also agreed to pay the lesser of $125,000 or 60% of project

costs for each successive calendar quarter, up to the lesser of $4 million or 60% of project costs. Under the Settlement Agreement, these payments fully satisfied and exhausted AMF's obligations under the relevant indemnity provisions of the 1981 Purchase Agreement.

## REASONS WHY THE PETITION SHOULD BE DENIED

The focus of Harley-Davidson's Petition is its claim that the Seventh Circuit—and the seven other circuit courts that have addressed this issue—erred in concluding that Section 107(e) of CERCLA does not bar the enforcement of indemnification agreements between PRPs. (Pet. pp. 21-34). The unanimous view of the circuit courts is the correct one, however, and review by this Court manifestly is not warranted. Harley-Davidson's second argument is that Chief Judge Posner's opinion below conflicts with a prior Seventh Circuit decision. (Pet. pp. 34-40). Not only is this untrue, it is a matter for the Seventh Circuit (which thought so little of Harley-Davidson's claim that it denied Harley-Davidson's request for rehearing *en banc*), not this Court. Finally, Harley-Davidson incorrectly claims that the Seventh Circuit erred in interpreting and applying the contractual provisions at issue, a subject that certainly is not of any general significance and thus is not appropriate for consideration by this Court. Accordingly, this Court should deny Harley-Davidson's Petition.

### I. EIGHT CIRCUIT COURTS HAVE UNANIMOUSLY AND CORRECTLY CONCLUDED THAT SECTION 107(e) OF CERCLA DOES NOT BAR ENFORCEMENT OF PRIVATE INDEMNIFICATION AGREEMENTS AMONG PRPs.

The issue of whether Section 107(e) bars enforcement of private indemnification agreements among PRPs has now been addressed by eight different circuit courts—the First, Second, Third, Fifth, Sixth, Seventh, Ninth and Tenth Circuits—and those courts have unanimously concluded that Section 107(e) presents no such bar. *Harley-*

*Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342 (7th Cir. 1994); *Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d 750, 755 (5th Cir. 1994); *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 112-13 (3d Cir. 1994); *Town of Munster, Ind. v. Sherwin Williams Co., Inc.*, 27 F.3d 1268, 1272 (7th Cir. 1994); *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 211 (3d Cir. 1994); *Keywell Corp. v. Weinstein*, 33 F.3d 159, 165 (2d Cir. 1994); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir.), *cert. denied sub nom. Advance Chemical Co. v. United States*, 114 S. Ct. 300 (1993); *AM Int'l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 994-95 (6th Cir. 1993); *Commander Oil Corp. v. Advance Food Service Equip.*, 991 F.2d 49, 51 (2d Cir. 1993); *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296, 1300-01 (6th Cir. 1992); *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 600, 692 (9th Cir. 1992); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986).[1] Section 107(e) reads, in its entirety, as follows:

---

[1] Additionally, while the few district courts that have endorsed Harley Davidson's position have all been overruled, either directly or indirectly, there are numerous reported district court decisions that have reached the same conclusion as the Seventh Circuit. *See, e.g., Kaufman and Broad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468 (N.D. Cal. 1993); *Armotek Indus., Inc. v. Freedman*, 790 F. Supp. 383 (D. Conn. 1992); *Fox River Grove, Ill. v. Grayhill, Inc.*, 806 F. Supp. 785 (N.D. Ill. 1992); *Robertshaw Controls Co. v. Watts Regulator Co.*, 807 F. Supp. 144 (D. Me. 1992); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309 (D.N.J. 1992); *Bowen Eng'g v. Reeve*, 799 F. Supp. 467 (D.N.J. 1992), *aff'd mem.*, 993 F.2d 223 (3d Cir. 1993), *aff'd mem.*, 19 F.3d 642 (3d Cir. 1994); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345 (D.N.J. 1991); *In re Hemingway Transp., Inc.*, 126 Bankr. 650 (D. Mass. 1991); *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448 (N.D. Ind. 1990); *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D.N.J. 1988); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp.

> (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to *transfer* from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person *the liability imposed* under this section. *Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.*
>
> (2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

42 U.S.C. § 9607(e) (emphasis supplied).

Though Section 107(e) may not be a model of statutory draftsmanship, it has not created any problem of appellate interpretation. The reason for this is plain. As Chief Judge Posner explained:

> The subsection taken as a whole is notably obscure, but we agree with every other appellate court that has been called on to interpret it that it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability. *E.g., John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993); *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993). The first sentence speaks of 'transfer[ring] . . . liability,' that is, of shifting liability from one person to another. Indemnification does not do that. The indemnified party remains fully liable to whomever he has wronged; he

---

1563 (E.D. Pa. 1988); *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987); *Chemical Waste Management, Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285 (E.D. Pa. 1987); *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1986), *aff'd in part and vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

> just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting.

(Pet. App. pp. A-2 - A-3).

In its Petition, Harley-Davidson asserts that "the *majority* of these [circuit] courts have not undertaken a careful and well-reasoned analysis of the statute." (Pet. p. 26 (emphasis supplied)). Even if this were true—which it is not—Chief Judge Posner's opinion manifestly constitutes a "careful and well-reasoned analysis." Chief Judge Posner first analyzes Section 107(e)'s express language, then goes on to discuss both the legislative history of Section 107(e) and the policy ramifications of the Seventh Circuit's interpretation. (Pet. App. pp. A-2 - A-5). Equally "careful and well-reasoned analyses" are found in the decisions of other circuit courts. *See, e.g., Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 210-11 (3rd Cir. 1994) (discussing the express language of Section 107 (e)(1) and the relationship between the first and second sentences of that provision); *AM Int'l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 993-95 (6th Cir. 1993) (discussing in detail the express language, legislative history and public policy of Section 107(e)). The fact that some circuit courts may have addressed this issue in a more perfunctory fashion than others is not a basis for review by this Court. Once an issue has become well settled, there is no reason for each successive court to provide a detailed repetition of prior analyses.

Harley-Davidson also argues that its Petition should be granted because the numerous circuit and district courts that have rejected the interpretation advanced by Harley-Davidson have "utilized different methods of interpreting the statutory language." (Pet. p. 29). To begin with, an even cursory review of the cases reveals that Harley-Davidson greatly overstates the inconsequential variations in analyses among the many courts that have addressed this issue. Moreover, inasmuch as dozens of courts have

been addressing these issues virtually simultaneously (based on the no doubt diverse arguments of the parties appearing before them), lack of perfect uniformity in approach is hardly unusual and is certainly immaterial.[2]

The important point here is that the judgment of the Seventh Circuit is consistent with the judgments of the seven other circuit courts that have addressed this issue. Chief Judge Posner correctly concluded that Section 107(e) does not bar indemnification agreements among PRPs. Review by this Court is unwarranted, and Harley-Davidson's Petition should be denied.

## II. THERE IS NO CONFLICT WITHIN THE SEVENTH CIRCUIT, AND EVEN IF THERE WERE SUCH A CONFLICT, CERTIORARI WOULD BE INAPPROPRIATE.

Harley-Davidson also asserts—incorrectly—that Chief Judge Posner's opinion is in conflict with *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994), and that this Court should grant certiorari to resolve this purported conflict. (Pet. pp. 34-40). First, intra-circuit conflicts should be addressed by the circuit court itself. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974). The Seventh Circuit had an opportunity to rehear this case *en banc*, and its decision not to do so does not merit review by this Court.

---

[2] Harley-Davidson also argues that this Court should grant certiorari to provide "guidance" regarding the meaning of Section 107(e) to the multitude of private parties that have entered into indemnification agreements with respect to the costs associated with CERCLA liabilities. (Pet. pp. 6-7, 21-23). What Harley-Davidson is really asking, of course, is that this Court issue an opinion which would void these agreements—which would have enormous repercussions for the parties to these agreements—so that indemnitors such as Harley-Davidson would be relieved of the contractual obligations they have undertaken. As Chief Judge Posner properly held, however, there is no legal basis whatsoever for Harley-Davidson's position.

Second, there is no conflict between Chief Judge Posner's opinion and the *Kerr-McGee* case. In *Kerr-McGee*, the Seventh Circuit held (without discussing Section 107(e)) that the defendant, Lefton, was required to honor its contractual indemnity obligation to the plaintiff, Kerr-McGee, and to pay the costs of the cleanup at issue. *Kerr-McGee*, 14 F.3d at 327. Harley-Davidson ignores this holding and instead focuses on Kerr-McGee's alternative claim for an equitable allocation of cleanup costs pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613. Although the Seventh Circuit did, indeed, discuss the equitable factors inherent in a Section 113 allocation, it then concluded, "[h]owever, since we hold below that Lefton must indemnify Kerr-McGee for its clean up costs it does not appear that a reallocation of contribution will be necessary on remand." *Kerr-McGee*, 14 F.3d at 326. Thus, there is no conflict between Chief Judge Posner's opinion and the *Kerr-McGee* decision, both of which conclude that indemnity agreements among PRPs are enforceable.

## III. THE PROPER INTERPRETATION OF THE DOCUMENTS HERE AT ISSUE DOES NOT PRESENT A QUESTION OF GENERAL IMPORTANCE.

Finally, Harley-Davidson argues that this Court should correct Chief Judge Posner's alleged errors in (1) ignoring the purported significance of the 1981 Purchase Agreement, and (2) misapplying state law in interpreting the 1980 Acquisition Agreement. These arguments are limited to the facts of this case and will affect a grand total of three parties—Harley-Davidson, AMF and Minstar—and therefore are inappropriate for review by this Court.

Moreover, Chief Judge Posner's analysis is absolutely correct. As to Harley-Davidson's first argument, Harley-Davidson ignores two crucial facts: (1) the 1981 Purchase Agreement was a stock sale, thus Harley-Davidson,

the successor by merger to the two former AMF subsidiaries whose stock was sold, *automatically* succeeded to all of the liabilities of these corporations (including liability relating to the York Facility); and (2) the settlement of Harley-Davidson's State Court Action against Minstar resolved the only relevant indemnity issues under the 1981 Purchase Agreement, thus the effect of the indemnity in the 1980 Acquisition Agreement was all that was left to be resolved. As to Harley-Davidson's second argument, Chief Judge Posner properly found that the indemnity provision in the 1980 Acquisition Agreement "could not be more broadly worded" and that the provision is "enforceable and applicable." (Pet. App. p. A-6).[3]

---

[3] Harley-Davidson also suggests that Chief Judge Posner erred in considering these matters at all, because they were not "plainly put forth in the record in as complete a form as is required for final determination of the legal principles involved." (Pet. pp. 46-47). Not only is this untrue, it was *Harley-Davidson itself* that asked the Seventh Circuit to address these matters. (Pet. App. p. A-5). Harley-Davidson cannot now complain that the Seventh Circuit should not have answered the questions Harley-Davidson put to it.

## CONCLUSION

Eight circuit courts have unanimously spoken regarding the meaning of Section 107(e), and review by this Court would serve no useful purpose. Harley-Davidson's Petition plainly reveals that Harley-Davidson is no more than a disgruntled litigant seeking one last chance to present its flawed arguments. Minstar and AMF therefore respectfully request that Harley-Davidson's Petition for Writ of Certiorari be denied.

Respectfully submitted,

J. ANDREW SCHLICKMAN *
GERARD D. KELLY
JAMES E. TAYLOR
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JOHN W. HEIN
DAVID J. EDQUIST
GIBBS, ROPER, LOOTS
& WILLIAMS, S.C.
735 North Water Street
Milwaukee, Wisconsin 53202
(414) 273-7000

*Counsel for Respondents*

* Counsel of Record

March 6, 1995